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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 675

ENOS L. SEEDS AND JOHN DERHAM, JR., INDIVIDUALLY AND TRADING AS SEEDS & DERHAM,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAMUEL E. EWING, JR.,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

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THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Enos L. Seeds and John Derham, Jr., Individually and trading as Seeds & Derham, petitioners herein, respectfully pray for a writ of certiorari to the Court of Claims of the United States to review the judgment of that court entered in this case on October 7, 1940, and therefore show as follows:

I. Summary Statement of Matter Involved.

Your petitioners entered into a contract with the United States for the construction of a dam across the Ohio River

at Emsworth, Pennsylvania. The questions here involved arose from two provisions of the contract, as follows:

(1) The dam was to be constructed in front of and abutting against an existing dam, and the existing dam was to be used as the downstream arm of the coffer dams for the new work;

(2) The contractors, Seeds & Derham, were required to take the labor furnished by the United States Government Employment Office.

Your petitioners claim a breach of both of these provisions in the contract, in that the existing dam was so leaky and defective it could not be used as the lower arm of the coffer dams for the new work, and in that the Government failed to supply qualified labor.

Your petitioners presented a claim for damages resulting from the idle machinery and idle labor forced to stand by while the defective old dam was being repaired, and also a claim for the losses due to the unqualified labor which they were obliged to use, recovery for such losses having been specifically provided for by the Act of Congress of July 23, 1937 (50 Stat. 533, Chap. 520). There were also several comparatively small claims for damages in connection with various items of the work, one of such claims being for damages for delay by the Government in permitting petitioners to proceed with certain work on a lock wall.

The testimony in the case was taken at various hearings by two Trial Commissioners, one such Commissioner hearing the plaintiffs' case and the other the defendant's. On June 5, 1940, the case was argued and submitted on its merits to the United States Court of Claims. On October 7, 1940, the said court filed its Special Findings of Fact and Conclusion of Law, and rendered judgment for the plain-

tiffs in the sum of $183.12 for damages on the small claim relating to the lock wall.

In the majority opinion written by Judge Whitaker and concurred in by Judge Littleton and Chief Justice Whaley, the plaintiffs were refused damages on both main items of their claim. However, Judge Green filed a dissenting opinion with respect to the item under which plaintiffs claim damages for the Government's failure to supply qualified labor in accordance with the provisions of the contract, it being Judge Green's opinion that damages on this item should be allowed.

II. Relevant Parts of Statutes Involved.

The Act of February 13, 1925, 43 Stat. 939, Chap. 229, Sec. 3, as amended by the Act of May 22, 1939, 53 Stat. 752 Chap. 140 (U. S. C. A. Title 28, Sec. 288 and Supp.) with respect to review of decisions of the United States Court of Claims provides as follows:

> "(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal.
>
> * * * * * * *
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

A complete copy of the relevant provisions of said Act as amended is set forth in the Appendix hereto, at page 22.

With respect to the claim for damages for unqualified labor, the relevant provisions of the Act of July 23, 1937 (50 Stat. 533, Chap. 520, U. S. C. A., Title 28, Sec. 250 b.) are as follows:

> "Jurisdiction is conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, * * * by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; * * *"

A complete copy of said Act is set forth in the Appendix hereto at pages 22-23.

III. Statement of Questions Presented.

1. When the Government breaches a contract and in order to cure the breach gives the contractor a Change Order for work required to cure the breach, such Change Order failing to include any provision for the payment of idle labor and equipment forced to stand by while the breach was being cured, may such contractor recover the damages resulting from the idle labor and equipment, or can the Government refuse payment on the ground that in the contract it, the Government, reserved the right to modify the contract and that the Change Order issued to cure the breach was merely a modification of the contract?

The Court of Claims held that the contractor could not recover.

2. Have executive officers of the Government authority to entertain and settle claims for unliquidated damages; and is a contractor barred from recovering unliquidated damages by the refusal of an executive officer of the Government to allow a claim for such damages?

The Court of Claims seems to infer that the contractor's claim in the present case was so barred.

3. Under the provisions of the Act of Congress of July 23, 1937, providing that contractors may recover damages incurred by reason of the Government having failed to supply qualified labor under the labor clauses of Government contracts, is a contractor barred from recovering losses suffered as a result of the Government's failure to supply him with qualified labor because he should have anticipated that the quality of the labor would be poor and because he received the same type of poor labor that was supplied by the Government agency to other contractors on other contracts?

The majority of the Court of Claims held that the contractor was so barred.

IV. Reasons for the Allowance of the Writ.

The following reasons are relied upon for the allowance of the writ and are discussed briefly in the supporting brief.

1. Congress has provided that claimants should be permitted to recover in all cases in which they would have been entitled to recover had the Government been suable as an individual.

The Court of Claims in the instant case has denied a recovery although had the defendant been an individual, the law as laid down by this Court and the Appellate Courts

of the various States would have permitted a recovery. The decision of the Court of Claims is a departure from the rule as heretofore made by it, and is not in accordance with the decisions of this Court or in accordance with the decisions of the Appellate Courts of the various States in respect to the liability of the defendant who is guilty of a breach of contract. Any change in the law with respect to the liability of the Government to a contractor for breach of contract is vital to all persons having contracts with the Government.

2. The Court of Claims in its decision attempted to vest in the executive officers of the Government power to entertain and settle claims for unliquidated damages for breach of contract, contrary to the decisions of your Honorable Court.

If this power to pass upon unliquidated claims for damages for breach of contract is placed in the executive officers of the Government in charge of carrying out contracts, it places every contractor absolutely at the mercy of the contracting official, whoever he might happen to be, and would open the door to gross abuses.

3. The determination of the third question by your Honorable Court is necessary in the public interest so that authoritative pronouncement can be made respecting the construction to be given the Act of Congress of July 23, 1937. This Act has not been construed heretofore. The judges of the Court of Claims were divided in their opinions as to the meaning of the language of the Act, and as was said by Judge Green in his dissenting opinion, if the construction of the majority of the court should be adopted, the Act will become meaningless and useless. There are a number of proceedings pending in the Court of Claims involving the construction of this Act and it is in the public

interest that your Honorable Court should clarify any doubt which now exists as to its meaning.

WHEREFORE your petitioners respectfully pray that this petition for writ of certiorari to review the judgment of the Court of Claims of the United States be granted.

And your petitioners will ever pray.

ENOS L. SEEDS and JOHN DERHAM, JR.,
Individually and Trading as SEEDS & DERHAM,
By WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAMUEL E. EWING, JR.,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

Philadelphia, Pa. January 3, 1941.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

As of the date of preparation of this brief, this case has not been officially reported. The majority opinion of the Court of Claims will be found on pages 72 to 80 of the Record, and the dissenting opinion on pages 81 to 82. The Special Findings of Fact will be found in the record on pages 61 to 71, and the Conclusion of Law on page 71.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the Act of February 13, 1925, 43 Stat. 939 Chap. 229, Sec. 3 as amended by the Act of May 22, 1939, 53 Stat. 752, Chap. 140 (U. S. C. A. Title 28, Sec. 288 and Supp. See Appendix, page 22).

2. Moreover, with respect to the plaintiffs' claim for damages caused by the Government's failure to supply properly qualified labor, the Act of July 23, 1937 (50 Stat. 533, Chap. 520, U. S. C. A. Title 28, Sec. 250b in Supp.) specifically provides for review of the judgment of the Court of Claims "in the same manner as is provided by law in other cases in such court" (See Appendix, pages 22-23).

3. The nature of the case, the rulings of the Court of Claims, and the reason why a writ of certiorari should be granted are set forth in the foregoing petition.

4. As shown in such petition, with respect to one of plaintiffs' main items of claim, *i. e.*, for damages resulting from breach of contract due to failure of the pre-existing dam, the reasons for review on writ of certiorari are among those set forth in Paragraph 5 of Rule 38 of the Rules of your

Honorable Court as construed in conjunction with Paragraph 3 of Rule 41 thereof, to wit:

(1) The Court of Claims has rendered a decision concerning a contractor's right to sue the Government for unliquidated damages in a way not in accord with the applicable decisions of your Honorable Court or with its own earlier decisions;

(2) The Court of Claims has decided a question concerning a contractor's right to sue the Government for unliquidated damages, which is a question of general importance, particularly at this time.

5. As shown in such petition, with respect to the plaintiffs' other main item of claim, *i. e.*, for damages incurred by reason of the Government's failure to supply properly qualified labor, the reasons for review on writ of certiorari are among those set forth in Paragraph 5 of Rule 38 of the Rules of your Honorable Court as construed in conjunction with Paragraph 3 of Rule 41 thereof, to wit:

(1) The Court of Claims has decided an important question of Federal law which has not been, but should be, settled by your Honorable Court;

(2) The Court of Claims has decided a claim of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by your Honorable Court.

Statement of the Case.

Your petitioners, the plaintiffs below, entered into a contract with the United States for the construction of a dam across the Ohio River at Emsworth, Pa., such dam to be constructed on the upstream side of, and parallel to and abutting, an old dam (Finding 2, R. 62). Under the con-

tract the new dam was to be built in four successive coffer dams, the first of which had been constructed previously by another contractor but had not been dewatered. The old dam was to act as the lower arm of each such coffer dam (Finding 3, R. 62-63), and was intended to contribute to the new dam its share of the horizontal resistance to the thrust of the water (See Finding 13, R. 69-70; Plffs'. Ex. D. R. 51).

When plaintiffs attempted to dewater the first coffer dam, it was discovered that there were large holes in the old dam, making it unfit for use as planned (Finding 4, R. 63). Change Order No. 1 was then issued by the Government, requiring plaintiffs to remedy the situation by building a steel sheet pile cut-off wall parallel with the old dam and one foot upstream from it, and filling in the space between with concrete (Finding 4, R. 63).

Plaintiffs accepted this Change Order and performed the work required thereby, but in doing so were obliged to hold idle at the job site the labor and equipment which had been assembled to perform the work under the contract, causing them a loss which according to the figures adopted by the Court of Claims is $57,675.06 (Finding 8, R. 66).

One of the main items here involved is plaintiffs' claim for damages resulting from the failure of the old dam, as above described. The Court of Claims has refused this claim, as well as two smaller claims relating to the height of the piers and the number of piles constructed, on the ground that the acceptance of the change order by the plaintiffs constituted a waiver of plaintiffs' claim for unliquidated damages arising from the Government's breach of contract (R. 72, 75).

The facts concerning the other main item here involved can be stated very briefly.

Under Article 19(a) of the contract, the plaintiffs were required to take their labor from the United States Em-

ployment Service (R. 98; Finding 14, R. 70). The Act of Congress of July 23, 1937 (the relevant provisions of which are quoted in the foregoing petition at page 4) provides that in such case if the Government fails to supply properly qualified labor, the contractor may recover the resulting excess costs. Despite positive uncontradicted testimony that the labor furnished was not properly qualified, the Court of Claims has refused recovery on this item, Judge Green dissenting.

Specification of Errors to be Urged.

1. With respect to the failure of the old dam, the Court of Claims erred in holding that the plaintiffs' acceptance of a change order is a good defense to their claim for unliquidated damages for breach of contract.

2. With respect to the failure of the old dam, the Court of Claims erred in holding that payment for work performed under a change order included payment for unliquidated damages suffered as a result of a prior breach of contract.

3. With respect to the failure of the old dam, the Court of Claims erred in basing its opinion in part on the decisions of Government executive officers denying plaintiffs' claims for unliquidated damages.

4. The Court of Claims erred in basing its findings as to sums due plaintiffs on *ex parte* findings of Government executive officers.

5. With respect to the failure of the old dam, the Court of Claims erred in refusing to enter judgment for the plaintiffs for damages for breach of contract.

6. The Court of Claims (in the majority opinion) erred in its construction of the Act of Congress of July 23, 1937.

7. The Court of Claims (in the majority opinion) erred in considering the report of the Committee of the House and the report of the War Department with respect to the said Act of July 23, 1937 prior to enactment.

8. The Court of Claims (in the majority opinion) erred in failing to construe the words "qualified labor", as used in said Act, according to the commonly understood meaning of such words.

9. The Court of Claims erred in failing to make a finding as to whether or not the labor was qualified.

10. The Court of Claims erred in failing to make a finding that the labor furnished was unqualified to such an extent as to delay the plaintiffs a specified number of days in the performance of the contract work.

11. The Court of Claims erred in refusing to enter judgment for the plaintiffs for the amount of plaintiffs' excess costs incurred by reason of the Government having failed to supply the plaintiffs with properly qualified labor.

ARGUMENT.

The plaintiffs, in their petition for writ of certiorari, have requested the court to review three questions, each of which will now be discussed very briefly.

1. When the Government breaches a contract and in order to cure the breach gives the contractor a change order for work required to cure the breach, such change order failing to include any provision for the payment of idle labor and equipment forced to stand by while the breach was being cured, may such contractor recover the damages resulting from the idle labor and equipment, or can the Government refuse payment on the ground that in the contract it, the Government, reserved the right to modify the con-

tract and that the change order issued to cure the breach was merely a modification of the contract?

It is respectfully submitted that the Court of Claims' answer to this question is in conflict with the decisions of your Honorable Court and the prior decisions of the Court of Claims allowing recovery for breach of contract in such cases, particularly the decisions in the cases of *U. S.* v. *Spearin,* 248 U. S. 133 (1918); *Karno-Smith* v. *U. S.,* 84 Ct. Cls. 110 (1936); *Plato* v. *U. S.,* 86 Ct. Cls. 665 (1938), and *Gillen* v. *U. S.,* 88 Ct. Cls. 347 (1939).

In its decision denying recovery to the plaintiffs, the Court of Claims relied principally upon certain portions of Change Order No. 1 (Ex. "C", R. 49-51). The portions of the Order relied upon by the Court of Claims should not properly be considered by themselves. So that their proper meaning may be shown clearly, the entire Change Order No. 1 is quoted herein, as follows:

> "It has been determined that in view of the impossibility of unwatering the cofferdams so that work may proceed therein, due to serious unforeseeable leakage through the foundations of the existing dam which forms the down-stream arms of the cofferdams, it is necessary and in the best interest of the United States to modify said contract in certain particulars as follows:
>
> "The contractor shall furnish all plant, labor, and materials and perform all work required to construct a steel sheet pile cut-off wall along the upstream face of the existing dam and under Pier No. 5, connecting the cut-off wall provided in the original contract, and the cut-off wall along the upstream face of the existing dam, as shown on drawing number O-LEM-65/1, U. S. Engineer Office, Pittsburgh, Pennsylvania, January 24, 1936.
>
> "**As a result of the above changes, the location of the new dam shall be shifted one foot upstream from the location shown on the original plans.**

"Payment for this work shall be made as follows:

"For furnishing and placing steel sheet piling (M-110)	$1.25 per sq. ft.
For furnishing and placing tie rods, bolts, clevises, etc.	0.20 per lb.
For removing and placing tie rods, bolts, clevises, etc.	0.03 per lb.
For placing and removing structural steel	0.03 per lb.
For concrete removal, per anchor	5.00 each
For wood block spacers	0.25 each
For furnishing and placing concrete under water (as provided in paragraph 5-13(d) of the specifications)	9.65 per cu. yd.

"For all other items affected by this change order, the unit prices set forth in the contract.

"It is understood and agreed that on account of the foregoing modification of said contract, the contract time shall be increased 10 days, plus one additional day for each 25 linear feet of cut-off wall, measured along the center line of the existing dam.

"It is further understood and agreed that all other items and conditions of said contract shall be and remain the same. The estimated cost of the proposed change is $110,084.66.

"This change order, being in excess of $500 in amount, does not become effective until approved by the Chief of Engineers.

"Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereon in the space provided below.

Yours very truly,

W. D. STYER,
Major, Corps of Engineers,
District Engineer."

It is respectfully submitted that if the Government can relieve itself from responsibility for damages caused by a breach of the contract, by giving the contractor a change

order to remedy the breach, and pay merely for the work done under the change order, then contractors dealing with the Government will be completely at the mercy of the Government and will lose the benefit of their right to hold the Government responsible in the same manner as though it were suable, as an individual is suable.

The Court of Claims took the following sentence from the Change Order: "It is further understood and agreed that all other items and conditions of the contract shall be and remain the same", and construed this sentence as though it had read "The contractor hereby waives all claims for damages resulting from a breach of warranty in respect to the existing dam". It is submitted that there is no possible justification for any such construction.

The Court of Claims also placed considerable emphasis on the fact that the change order referred to a "modification" of the original contract. Apparently it felt that the execution of the change order constituted a novation, or an accord and satisfaction, eliminating from future consideration any claims arising from a breach of the original contract. Such was not, and could not have been, the case. The Government contracting officer had no authority to entertain or settle claims for unliquidated damages, a principle firmly established by a long line of cases. (*Clyde* v. *U. S.*, 13 Wall. 35, 39; *Wm. Cramp & Sons* vs. *U. S.*, 216 U. S. 494 (1910).) Since the Government could not have been bound by the official making the change order, so far as unliquidated damages are concerned, it is submitted that the plaintiffs' right to such damages could not have been affected by the change order.

It must be remembered that if the Government had desired the change order to eliminate any possible claims for damages resulting from the failure of the old dam, a statement to such effect could easily have been inserted in the

change order. It is well settled that the rule that a contract is to be construed most strongly against the party preparing it, applies to the Government in a case like this (*U. S.* v. *Newport News Shipbuilding & D. D. Co.*, 178 Fed. 194, C. C. of App. 4th Cir. (1910); *Scully* v. *U. S.*, 197 Fed. 327 D. C. Nev. (1912); *Ohio Bank etc.* vs. *Willys Corp.*, 16 Fed. (2d) 859, C. C. of App. 3rd Cir. (1926)).

When plaintiffs' accepted the "modification of the contract", they were agreeing to do the work necessary to cure the breach, and they were agreeing to accept certain prices for such work. The change order made no provision for unliquidated damages. True, it "provided for the payment of the entire increase in costs *due to the changes made*", as stated in the opinion of the Court of Claims (R. 75); but it did not provide for the payment of the increase in costs *due to the delays incurred as a result of the Government's breach of contract.*

In *Nourse* v. *U. S.*, 25 Ct. Cls. 7 (1889), the plaintiffs had been engaged in performing Government contracts for the remodeling of certain guns, when they were instructed by the proper Government official to suspend work. Quoting from the opinion of the court (p. 19):

> "* * * about five weeks after notice of suspension, and in consequence of it, the parties entered into a new arrangement, which they called 'supplemental articles of agreement, amendatory of the contracts'.
>
> "In this amendatory contract the defendants agree to pay the claimants for the work already done $42,-029, and to allow them to complete the work if they (the defendants) should eventually desire to have it done by anybody. The claimants agree to accept this sum in full satisfaction of all work and profits up to that date, and to complete their several contracts 'when so permitted' by the defendants on the original terms."

Five years went by and the Government had not instructed the plaintiffs to complete the work. Plaintiffs then

filed their claim for profits on the unexecuted portion of the contracts. The Court of Claims held that the long delay on the part of the Government was in effect an abandonment of the contracts and that the "amendatory" agreement did not bar the plaintiffs from suing for damages on the original contracts. Similarly in the case at bar, the change order drawn up by the Government official should be construed in the way most favorable to the plaintiffs, and should not be considered a bar to their recovery of damages on the original contract.

2. Have executive officers of the Government authority to entertain and settle claims for unliquidated damages; and is a contractor barred from recovering unliquidated damages by the refusal of an executive officer of the Government to allow a claim for such damages?

All through the opinion of the Court of Claims there are references to the fact that the contractors made claim to the contracting officer or the engineer in charge and that the engineers in charge denied the claim, with the apparent assumption that the failure on the part of the contractor to appeal from the decision of the engineers was fatal to the claim.

As stated above, it is well settled that executive officers of the Government are not authorized to entertain and settle claims for unliquidated damages. In *Plato* v. *U. S.* (*supra*), provisions of the contract and specifications relating to disputes and claims and protests, substantially identical with the provisions of the contract here in suit, were considered by the court, which said (p. 677-678):

> "However, it has nowhere been held by this Court, or the Supreme Court, that claims for damages resulting to a contractor because of delays on the part of the Government are of the character of disputes contemplated in Article 15 of the contract which are to

be submitted to and decided by the contracting officer, or his duly authorized representative.

"This Court has recently decided that precise question in Phoenix Bridge Co. *v.* United States, No. 42084, 85 C. Cls. 603. Article 15 of the contract in that case relating to disputes was quite similar to Article 15 of the instant case. The Government in that case contended that as a prerequisite to suit, a claim for damages arising out of delay on the part of the Government had to be presented to the contracting officer for decision. The court rejected this contention: 'Counsel for defendant appear to contend that the court may not award plaintiff damages for delay caused by the defendant for the reason that plaintiff did not submit its claims for unliquidated damages to the contracting officer. But there was no provision in the contract requiring that this should be done as a condition to the plaintiff's right to sue, or as a condition to the exercise of jurisdiction over the claims by the court. Art. 15 of the contract related to disputes but makes no reference to the matter of submission of claims for damages for delays caused by the defendant. Art. 9 of the contract provided that plaintiff should notify the contracting officer of the delays and that such officer should ascertain the facts and extent of the delay but does not provide for the submission of damage claims for such delays. Paragraph 20 of the specifications related to the filing of protests. Art. 3 of the contract related to changes; Art. 4 concerned changed conditions, and Art. 5 related to extra work. None of these provisions required plaintiff to submit to the department its claims for the amount of damages for delays. In Clyde *v.* United States, 13 Wall. 35, 39, the court held that to require claimants to first submit their claims to the department was "establishing a jurisdictional requirement which Congress alone had the power to establish." ' "

If the decision of the Court of Claims was based on the action of the executive officer and the failure to appeal from

his decision, it is contrary to the rule previously laid down and followed by your Honorable Court and the Court of Claims itself. However, it may very well be that the references to executive rulings were in the opinion merely as makeweight and not as the basis of decision, but even in such event as makeweight they were utterly valueless to sustain the decision.

3. Under the provisions of the Act of Congress of July 23, 1937, providing that contractors may recover damages incurred by reason of the Government having failed to supply qualified labor under the labor clauses of Government contracts, is a contractor barred from recovering losses suffered as a result of the Government's failure to supply him with qualified labor because he should have anticipated that the quality of the labor would be poor and because he received the same type of poor labor that was supplied by the Government agency to other contractors on other contracts?

The Act of July 23, 1937 (copy of which is attached hereto in the Appendix, at pages 22-23) was passed by Congress for the relief of contractors holding contracts for flood-control work in the Mississippi Valley who were compelled to take labor furnished by the United States Employment Office under the terms of their contracts. The Court of Claims, construing this Act for the first time, held by a divided court that unless the labor furnished to the contractor was worse than he could reasonably have anticipated, the Act could afford him no relief. The dissenting opinion of the Court of Claims stated that such a construction rendered the Act meaningless and useless, that a contractor was entitled to recover in the event that the labor furnished was not "qualified", *i. e.*, competent, fit or capable, and that the word "qualified" needed no explanation or construction.

In *Young-Fehlhaber Pile Co.* v. *U. S.*, 90 Ct. Cls. 4 (1939), the plaintiff performed a contract for re-enforcing a pier, such contract containing a provision like the one here in question, providing that the labor should be furnished by the United States Employment Service. After the contract time had been extended several times, the work was finally completed and plaintiff claimed for damages suffered as a result of the Government's failure to provide labor in accordance with the contract provisions. The situation was evidently identical with the present case. The court found (Finding 5, p. 6):

> "Plaintiff repeatedly requested the employment service to send men to the work but sufficient men were not supplied and did not report to plaintiff. Such men as did report were in many cases not qualified to perform the type of work for which they had been requested and plaintiff was forced to train such men on the job as best it could."

As the pier which the Young-Fehlhaber Company reenforced was not on the Mississippi River or its tributaries, the Act of July 23, 1937, did not apply. The court held that the contract "carried an implied agreement to furnish the men necessary to carry on the work" (p. 11), having first stated:

> "But the United States Employment Service was not able to furnish sufficient qualified men to carry on the work and the necessary workmen could not be obtained in accordance with the terms of the contract. Part of this was caused by the dangerous nature of the work and part by other causes."

Thus, the Young-Fehlhaber Company was allowed to recover damages for the delay caused by the Government's failure to supply the necessary qualified workmen under the provisions of the contract. How much more so should

the plaintiffs in the present case be entitled to recover damages, in view of the fact that Congress, in the Act of July 23, 1937, has clearly expressed its intent that recovery in such cases should be allowed.

There are numerous cases pending in the Court of Claims under this Act. In view of the fact that the Court of Claims was not unanimous in construing the Act, your petitioners believe that an authoritative ruling should be made as to the meaning of the Act.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for.

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SAUL, EWING, REMICK & SAUL,
Of Counsel.

January 3, 1941.

APPENDIX I.

Act of Congress of February 13, 1925, 43 Stat. 939 Chap. 229 Sec. 3, as amended by the Act of May 22, 1939. 53 Stat. 752, Chap. 140 (U. S. C. A. Title 28, Sec. 288 and Supp.)

"(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or Claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

APPENDIX II.

Act of Congress of July 23, 1937, c. 520, 50 Stat. 533. U. S. C. A. Title 28, Sec. 250b in Supp.

"Jurisdiction is conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation

on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and consistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their personnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment made prior to July 23, 1937, *res adjudicata,* laches, or any provision of law to the contrary.

This section shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court." (July 23, 1937, c. 520, 50 Stat. 533.)

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 675

ENOS L. SEEDS AND JOHN DERHAM, JR., INDIVIDUALLY AND TRADING AS SEEDS & DERHAM, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 61) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1940 (R. 190). The petition for a writ of certiorari was filed on January 4, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, under Articles 3 and 4 of a standard form Government contract, a contractor accepting without protest change orders modifying the specifications of the original contract and allowing additional compensation on account of the changes, may recover damages for delays resulting from the changes.

2. Whether the Act of July 23, 1937, conferring jurisdiction upon the Court of Claims to pass upon claims of certain contractors for alleged excess costs incurred "by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts," directs the award of damages in a case in which the contract provided that the persons to be employed on the project should be taken from the relief rolls, and the labor thus obtained was of a quality equal to the average ordinarily obtainable from the relief rolls.

STATUTE INVOLVED

The Act of July 23, 1937, c. 520, 50 Stat. 533, 28 U. S. C. § 250b, is set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

In December 1935, petitioners entered into a contract with the United States, on the standard Government form, to construct a dam in the Ohio River parallel to and abutting on an existing dam (Fdg. 2, R. 62). The contract provided that the

new dam was to be built in four successive cofferdams, the first of which had already been constructed but not dewatered. The existing dam was to serve as the downstream arm of each of the cofferdams (Fdg. 3, R. 63). When petitioners attempted to dewater the cofferdam which had been built previously, they discovered that there were large holes underneath the old dam which made its use as the lower arm of the cofferdams impossible (Fdg. 4, R. 63). In order to remedy this unforeseeable condition, it was determined to build a steel sheet wall one foot upstream from the old dam and parallel to it, and to fill in the intervening space with concrete (Fdg. 4, R. 63). These changes were embodied in change order No. 1, which set $110,159.66 as the estimated cost of the change, and which was in the form of a modification of the original contract and was accepted by petitioners as such (Fdg. 4, R. 63). Petitioners performed the work and accepted without protest the $110,159.66 (Fdg. 5, R. 64).

This change order was issued pursuant to Articles 3 and 4 of the contract (R. 50, Fdg. 5, R. 63). Article 4 provides for changes due to "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications," and for equitable adjustment of prices and terms, according to the procedure established by Article 3 (R. 64). The latter article (R. 63–64) reserves to the contracting officer the right to make changes altering the speci-

fications and drawings, within the general scope of the contract, and provides for an "equitable adjustment," by agreement of the parties, of the amounts due under the contract or in the time required for performance. If the parties cannot agree upon an adjustment, the dispute is to be resolved as provided in Article 15, the general clause (R. 65) regarding disputes arising under the contract, which provides that an appeal may be taken by the contractor to the head of the department or his duly authorized representative, "whose decision shall be final and conclusive upon the parties thereto".

Thereafter, change order No. 5, covering 292 additional piles made necessary by the unanticipated condition of the old dam, was issued under Articles 3 and 4 (R. 51–52), and was accepted by petitioners (Fdg. 13, R. 69). Petitioners received $13,560.89 for this work, and their time was extended (R. 52).

More than a year after the issuance of change order No. 1, petitioners presented various claims for losses due to idle labor and equipment, attributed by them to delays consequent upon the changes (Fdg. 5, R. 64–65; Fdg. 7, R. 66; Fdg. 13, R. 69). The contracting officer rejected these claims on the ground that the adjustments contained in the change orders covered all claims connected with changes (Fdg. 5, R. 65; Fdg. 7, R. 66; Fdg. 13, R. 69–70). Petitioners appealed under Article 15 of the contract from some, but not all, of the decisions of the contracting officer

and his decisions were affirmed (Fdg. 6, R. 66; Fdg. 13, R. 69–70).

Due to an unprecedented flood on the Ohio River in 1936, the United States issued change order No. 6, increasing the height of the piers of the dam by six feet (R. 53–57). This change was also accepted by petitioners as a modification of their contract (Fdg. 10, R. 67). Over a year after the issuance of this order petitioners filed two claims for losses due to delays suffered in their work because of this change. The contracting officer disallowed both claims; petitioners appealed from one of these decisions, which was affirmed (Fdg. 10, R. 68).

Petitioners also made claims based on the quality of the labor which they were required under their contract to employ. Article 19 (a) provided that, except for certain key jobs, the labor used on the project should be employed through the United States Employment Service, and that preference should be given to men on the public relief rolls (R. 70). In May 1936 petitioners complained that it was impossible to obtain the necessary labor from the relief rolls, and requested extra compensation and an extension of time. The contracting officer found that a total delay of five days had occurred, and, with petitioners' concurrence, issued change order No. 7 extending the contract time by that length of time (Fdg. 14, R. 71). Except as set out in change order No. 7, there was no shortage of labor, and the labor furnished was of a

quality equal to the average ordinarily obtainable from the relief rolls (Fdg. 14, R. 71).

In November 1938, petitioners brought suit in the Court of Claims to recover for alleged losses due to delay connected with the change orders. Petitioners also included a claim under the Act of July 23, 1937, based on the quality of labor furnished them. The court unanimously held that petitioners' acceptance of the change orders without objection precluded a subsequent action for damages caused by delays. The court also held, one judge dissenting, that since the type of labor obtained by petitioners from the relief rolls was such as should have been anticipated under their contract, the Act of July 23, 1937 did not entitle them to recover.[1]

ARGUMENT

1. Petitioners contend that the inadequacy of the existing dam for the use contemplated by the contract constituted a breach of warranty, and that the change orders issued by the contracting officer because of the defects in the dam did not, and, because of the officer's lack of authority to settle claims for unliquidated damages, could not, make any allowance for the delays resulting from the changes. The existence of any warranty as to the adequacy of the old dam is negatived by Article 4 of the contract, which directs that the

[1] In the court below, petitioners also presented some minor claims which are not pressed here or are at least not relied on as warranting certiorari (Pet. 2, 4–5, 5–6).

necessary changes be made in the drawings and specifications in the event of discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated on the specifications," and that an equitable adjustment be made for any increase in cost and difference in time resulting from such changes. Even assuming, however, that the Government undertook that the dam would be suitable for the use contemplated by the contract, the exclusive remedy for losses caused by latent defects is that prescribed by Articles 3 and 4. Cf. *United States* v. *McShain*, 308 U. S. 512, 520.

There is no basis under the contract for the distinction drawn by petitioners between increase of cost directly incurred in performing the work required by the change orders and increase due to delays, resulting from the changes, in completing the contract. Since Article 4 carries the "reasonable implication" that "if such changes were made, delay in the prosecution of the work might result" (*Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 525), it seems clear, as the court below held (R. 73), that the adjustment to be made under that article for increase in cost includes any increase due to delay. Where, as here, the contractor accepts the change orders and the allowances of additional compensation without protest, he must be deemed to have waived any claim for still further allowances. Such has been the settled rule of the Court of Claims with

respect to change orders within the "general scope" of the contract under Article 3 or similar provisions.[2] No reason is seen for a different rule with respect to change orders issued under Article 4. Since the Government did not warrant the adequacy of the dam for its contemplated use, and, in any event, agreed to make an equitable adjustment if any change in specification was made, the question whether a Government officer has general authority to settle a claim for unliquidated damages is thus not involved.

Karno-Smith Co. v. *United States,* 84 C. Cls. 110, relied on by petitioners (Pet. 13), is clearly distinguishable. In that case the Government apparently did not contend that the acceptance of a change order under Articles 3 and 4 without protest precluded subsequent claims for damages due to delay; as waiving the claims it relied solely on a letter of the plaintiff. In its opinion in that

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[2] *McCord* v. *United States*, 9 C. Cls. 155, *aff'd sub nom. Chouteau* v. *United States*, 95 U. S. 61, 68; *Swift & Co.* v. *United States*, 14 C. Cls. 208, 232–233; 14 C. Cls. 235; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 102; *Lange* v. *United States*, 61 C. Cls. 666, 682, certiorari denied, 273, U. S. 708; *Carroll* v. *United States*, 69 C. Cls. 435; *Fore River Shipbuilding Co.* v. *United States*, 62 C. Cls. 307, 317; *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, 79 C. Cls. 1, 19–23; 79 C. Cls. 25, 34–35; 79 C. Cls. 37, 45; 79 C. Cls. 46, 53; *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 523; *Snare & Triest Co.* v. *United States*, 75 C. Cls. 326, 349–350; *cf. Crook Co.* v. *United States*, 59 C. Cls. 593, *aff'd*, 270 U. S. 4; *Wells Bros. Co.* v. *United States*, 254 U. S. 83; *Wood* v. *United States*, 258 U. S. 120.

case the Court of Claims did not refer to Articles 3 and 4, and rejected the defense of waiver on the ground of want of consideration. In *United States* v. *Spearin*, 248 U. S. 132, *Plato* v. *United States*, 86 C. Cls. 665, and *Gillen* v. *United States*, 88 C. Cls. 347, also relied on by petitioners, the question of the effect of the acceptance of a change order without protest was not involved.

2. The Act of July 23, 1937, 50 Stat. 533, confers jurisdiction on the Court of Claims to entertain claims by contractors constructing dams on the Mississippi River and its tributaries for alleged excess costs incurred "by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts * * *." Petitioners contend that the labor supplied them by the Government was not "qualified."

Article 19 (a) of petitioners' contract required them to recruit their labor from persons on the public relief rolls. The court below found, and petitioners do not deny, that "the labor furnished was of a quality equal to the average ordinarily obtainable in the way provided for in the contract" (R. 71). Since petitioners knew that their labor would be drawn from this source, and doubtless adjusted their bid price accordingly (see R. 79), they have received all they were entitled to under the contract. And the Act of July 23, 1937, it is plain, does not provide for recovery in cases where the Government complied with its ob-

ligations "under the labor clauses of the * * * contracts". See also H. Rept. No. 296, 75th Cong., 1st Sess., p. 3; S. Rept. No. 645, 75th Cong., 1st Sess., p. 4; 81 Cong. Rec. 7081.

Young-Fehlhaber Pile Co. v. *United States,* 90 C. Cls. 4, upon which petitioners rely (Pet. 20), is not opposed. The opinion of the court in that case deals solely with the Government's failure to supply a sufficient *quantity* of men to enable the contractor to proceed with his work; moreover, the Government's own officials conceded that the men were not qualified (p. 7). The Government's sole contention was that the United States was under no contractual duty, under Article 19 (a), to furnish any labor at all.

CONCLUSION

The decision of the court below is plainly correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1941.

APPENDIX

The Act of July 23, 1937, c. 520, 50 Stat. 533, U. S. C., Supp. V., Title 28, § 250b, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their personnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on

their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res judicata, laches, or any provision of law to the contrary.

This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

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